Supreme Court, U.S.
FILED

011049 JAN - 2 2002

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

YECHIEL ABRAMOV,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, Second District

PETITION FOR WRIT OF CERTIORARI

ROBERT P. WILL, JR.
Counsel of Record
ROBERT P. WILL, JR. & ASSOCIATES
Seven South County Street
Waukegan, Illinois 60085
(847) 336-4440

Attorney for Petitioner

Midwest Law Printing Company/Photex — Chicago — (312) 321-0220

47pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Illinois Appellate Court Erred in Affirming the Trial Court's Denial of the Defendant's Motion to Dismiss and Motion in Limine Based upon the State's Discovery Violations thus Denying the Defendant his Sixth Amendment and Due Process Rights.

II. Whether the Illinois Appellate Court Erred in Affirming The Trial Court's Granting the State's Motion in Limine Based upon the Attorney-client Privilege Superceding the Defendant's Sixth Amendment and Due Process Rights.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 12

I. Whether the Illinois Appellate Court Erred in Affirming the Trial Court's Denial of the Defendant's Motion to Dismiss and Motion in Limine Based upon the State's Discovery Violations thus Denying the Defendant his Sixth Amendment and Due Process Rights 12

II. Whether the Illinois Appellate Court Erred in Affirming The Trial Court's Granting the State's Motion in Limine Based upon the Attorney-client Privilege Superceding the Defendant's Sixth Amendment and Due Process Rights 14

CONCLUSION 19

APPENDICES

A - Illinois Appellate Court Rule 23 Order .... App. 1

B - Illinois Appellate Court Denial of Petition for Rehearing ..... App. 20

C - Illinois Supreme Court Denial of Petition for Leave to Appeal ..... App. 21

TABLE OF AUTHORITIES

Cases PAGE(S)

In re Chicago Flood Litigation (1997),
289 Ill.App.3d 937, 683 N.E.2d 421 17

In re Marriage of Decker (1992),
153 Ill.2d 298, 606 N.E.2d 1094 18

Nix v. Whiteside (1986),
475 U.S. 157, 106 S.Ct. 988 18

People v. Koutsakis (1993),
255 Ill.App.3d 306, 627 N.E.2d 388 13

People v. Newberry (1995),
166 Ill.2d 310, 652 N.E.2d 288 13

People v. Petty (2000),
311 Ill.App.3d 301, 244 Ill.
Dec. 171, 724 N.E.2d 1059 14

People v. Sleboda (1988),
166 Ill.App.3d 42, 519 N.E.2d 512 13

People v. Wurbs (1976),
38 Ill.App.3d 360, 364, 347 N.E.2d 879 18

United States v. Zolin (1989),
491 U.S. 554, 109 S.Ct. 2619 18

Constitutional and Statutory Provisions Involved

U.S. Const., Amend. VI 3

Ill. Const., Art. 1, Sec. 8 3

Ill. Sup. Ct. Rule 412 ..... 3, 4

Ill. Sup. Ct. Rule 415 4

Ill. Sup. Ct. Rules of Professional Conduct, Rule 1.6 4

Yechiel Abramov, Defendant herein, respectfully petitions for a Writ of Certiorari to review the judgment of the Illinois Appellate Court, Second District.

OPINIONS BELOW

The unpublished opinion of the Illinois Appellate Court, Second District, filed on April 5, 2001, is reproduced in the Appendix. (App. 1-19.) The Appellate Court denied the Defendant's petition for rehearing on May 4, 2001. (App. 20.) The Illinois Supreme Court denied leave to appeal on October 3, 2001. (App. 21.)

JURISDICTION

On June 7, 1995, the State charged the Defendant by indictment with three counts of Solicitation of Murder for Hire (720 ILCS 5/9-1(a)(1); 720 ILCS 5/8-1.2(a)); one count of Attempt First Degree Murder (720 ILCS 5/9-1(a)(1); 720 ILCS 5/8-4(a)); one count of Home Invasion (720 ILCS 5/12-11(a)(1)); one count of Armed Violence (720 ILCS 5/12-4(a)); one count of Aggravated Battery with a Firearm (720 ILCS 5/12-3; 720 ILCS 5/12-4.2(a)(1)); and one count of Conspiracy to Commit First Degree Murder (720 ILCS 5/9-1(a)(1); 720 ILCS 5/802(a)). (C.6-15.) Following a jury trial, the Defendant was convicted of three counts of Solicitation of Murder for Hire; one count of Attempt First Degree Murder; one count of Aggravated Battery with a Firearm; and one count of Conspiracy to Commit First Degree Murder. (C.157-162; R.1053-1054, 1125-1130, 1347-1351.) The trial court sentenced Defendant to thirty-five years for the three counts of Solicitation of Murder for Hire; thirty

years for Attempt First Degree Murder; thirty years for Aggravated Battery with a Firearm; and fifteen years for Conspiracy to Commit First Degree Murder. The sentences were ordered to run concurrently. (C.198.) The Defendant appealed the conviction which, pursuant to a Rule 23 Order entered April 14, 1997, the Appellate Court reversed and remanded for a new trial. (2d Dist. No. 2-95-1401; C.209-225.)

Proceeding under the same indictment (R.1125-1130, 1347-1351) and following a bench trial, the Honorable George Bridges found the Defendant guilty of all charges. The court sentenced the Defendant to concurrent twenty-nine year terms for one count of Solicitation of Murder for Hire and one count of Attempt First Degree Murder; and a consecutive term of six years for one count of Aggravated Battery with a Firearm. (C.348, 700.) The court denied the Defendant's post-trial motions and the Defendant filed a timely notice of appeal. (C.582-584, 651-654, 708-709.) The Illinois Appellate Court, Second District, in a Rule 23 unpublished order, affirmed the trial court. (App. 1-19, infra.) On October 3, 2001, the Illinois Supreme Court denied discretionary review. (App. 21.) This Petition for Writ of Certiorari is filed within ninety days of the denial of discretionary review by the highest court of review in the State of Illinois.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution states in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to *** be confronted with the witnesses against him."

Article One, Section 8 of the Constitution of the State of Illinois states in pertinent part:

> "In criminal prosecutions, the accused shall have the right to be confronted with the witnesses against him ***."

Illinois Supreme Court Rule 412 states in pertinent part:

> "(a) [T]he State shall, upon written motion of defense counsel, disclose to defense counsel the following material and information within its possession or control:
>
> (i) the names *** of persons the State intends on calling as witnesses, together with their relevant *** recorded statements ***;
>
> (ii) any *** recorded statements *** made by the accused ***;
>
> ***
>
> (b) The State shall inform defense counsel if there has been any electronic surveillance (including wiretapping) of conversations to which the accused was a party ***;
>
> ***

> (f) The State should ensure that a flow of information is maintained between the various investigative personnel and its office sufficient to place within its possession or control all material and information relevant to the accused and the offense charged."

Illinois Supreme Court Rule 415 states in pertinent part:

> "(g) Sanctions. (i) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may *** exclude such evidence, or enter such other order as it deems just under the circumstances."

Rule 1.6 of the Illinois Supreme Court Rules of Professional Conduct states in pertinent part:

> "(a) Except when *** permitted under Rule 1.6(c), a lawyer shall not, during or after termination of the professional relationship with the client, use or reveal a confidence or secret of the client known to the lawyer unless the client consents after disclosure.
>
> * * *
>
> (c) A lawyer may use or reveal:
>
> * * *
>
> (2) the intention of a client to commit a crime in circumstances other than those enumerated in Rule 1.6(b) ***."

STATEMENT OF THE CASE

On April 12, 1995, at approximately 10 A.M., Leroy Solti and Lamar Jones forcibly entered the Defendant's home at 212 Killarney Road in Grayslake, Illinois. The Defendant's wife, Angela Litvak, and their two-year-old son, Vladimir, were at home at the time of the invasion; the Defendant was at his job as the Assistant Manager of Bee-Zee Automotive in Evanston, Illinois. Solti and Jones robbed, stabbed and shot the Defendant's wife and were arrested shortly thereafter by the Grayslake Police Department. After their arrest, Solti and Jones told the police that the Defendant hired them to kill his wife. On the date of the attack, the Grayslake Police Department extensively questioned the Defendant regarding his alleged involvement. The Defendant denied any involvement in the attack and was released from custody. Angela was released from the hospital the next day, and moved with her husband and baby into her mother's home in Buffalo Grove. The Defendant and his wife continued to live together until the Defendant's arrest on May 24, 1995.

Pretrial Discovery Violations – Destruction of Audio Tapes

Prior to trial the court entered mutual discovery orders (R.1128-1129, 1169-1172) and, pursuant to a specific request by the Defendant, ordered that the State disclose any audio tapes of conversations between the Defendant and the Grayslake Police Department on the date of the attack. (C.553; R.1244, 1261)

The Defendant filed a Motion to Dismiss and a Motion in Limine based on alleged discovery violations. (C.295,

305, 317-318, 335-336.) The basis of the motions was the loss of police-recorded audio tapes of conversations between the Defendant and the Grayslake Police Department on the date his wife was attacked. (R.1227-1262.)

At the hearing on the Defendant's motions, Officer Douglas Hess of the Grayslake Police Department, one of the main investigators in the case at bar, testified there were several telephone conversations between the Defendant and Grayslake Police Department shortly after the attack on the Defendant's wife. The conversations were taped as part of an automated system that records all calls on designated phone lines in the Grayslake Police Department. (R.1378-1381.) The Grayslake Police Department routinely preserves the tapes of recorded conversations for thirty days prior to recycling them. Hess further testified that once such tapes are determined to have evidentiary value, the Grayslake Police Department retains them in the department's evidence room. Hess concluded that an investigative decision had been made prior to the search that the tapes of the conversations with the Defendant did indeed have evidentiary value. (R.1379-1384.)

Hess testified that on the day of the attack Officer Hedland questioned the Defendant as a suspect at the Grayslake Police Department regarding his alleged involvement in the attack on his wife. Between the date of the attack and the beginning of the search for the tapes, Hess admitted that he had conversations with the State's Attorney's Office regarding the Defendant as a suspect, and that the Grayslake Police Department regarded the Defendant as a suspect immediately after the attack. (R.1384-1394.)

Hess testified that, at the request of the State's Attorney's Office, he took part in an extensive and exhaustive search of the entire Grayslake Police Department in an attempt to locate the missing tapes. The search for the missing tapes began approximately two weeks after the attack. (R.1379-1384.)

Susan Bobka, the Director of Communications for the Grayslake Police Department, testified that she had three recorded phone conversations with the Defendant on the date of the attack. She further stated that an automatic recording system routinely recorded the phone conversations to and from the Grayslake Police Department; a single tape covers a twenty-four hour period and the tapes are recycled every thirty days. Bobka testified that shortly before the Defendant's first trial in September of 1995, approximately five months after the conversations took place, she prepared a written summary of her conversations with the Defendant. Bobka also participated in the search of the Grayslake Police Department for the missing tapes. When asked about the disposition of the tapes, Bobka testified that she "[did] not know what happened to the tapes" and did not "know where the tapes are". (R.1395-1401.)

June Kuhfuss, an employee in the Records Department of the Grayslake Police Department, testified that she had two recorded phone conversations with the Defendant shortly after the attack on his wife. Kuhfuss testified that she, like Bobka, was asked by the State's Attorney's Office to prepare a written summary of her conversations with the Defendant; she also compiled the report shortly before the Defendant's trial in September of 1995, some five months after the conversations took place. Kuhfuss did not participate in the search for the missing tapes. (R.1405-1410.)

The court, finding that the Defendant was not prejudiced by the loss of the tapes and that the State had not committed a discovery violation, denied the Defendant's Motion to Dismiss Based on Discovery Violations and related Motion in Limine. (R.1417-1420.)

At trial, Susan Bobka, the Director of Communications for the Grayslake Police Department, testified that after the attack on Angela Litvak, she placed a call to the Defendant's place of business. Bobka advised the Defendant that he needed to come to the Grayslake Police Department; the Defendant asked if his wife was dead. Bobka responded that she could not give that information. Bobka testified that the Defendant was not screaming or crying and had "no tone of voice". According to Bobka, the Defendant did not ask about his son during this conversation. (R.2314-2317.) Bobka testified that the Defendant called back approximately fifteen to twenty minutes after their initial conversation. Bobka described the Defendant's tone of voice during the second conversation as "very matter of fact" with no inflection. (R.2317- 2319.) Bobka testified that she again spoke to the Defendant about half an hour later when he called the Grayslake Police Department. Bobka testified that she again advised the Defendant to come to the station and he again asked if his wife was dead. Bobka testified that there was no change in the inflection of his voice. (R.2319-2321.)

Bobka testified that her three phone conversations with the Defendant had been recorded, though the tape could not be located. Bobka testified that shortly before the Defendant's trial in September of '95 the State's Attorney and Detective Hess asked to prepare a written summary of her conversations with the Defendant; she

compiled the report as requested, approximately five months after the conversations took place. She further testified that the timing of the calls with the Defendant were estimates based on her recollection and admitted they could be inaccurate. Bobka testified that the Defendant had been contacted by June Kuhfuss of the Grayslake Police Department prior to Bobka's conversations with him. (R.2321-2328.)

June Kuhfuss, an employee in the Records Department of the Grayslake Police Department, testified at trial that after the attack on Angela Litvak, she called the Defendant at work. She informed the Defendant that there was a problem at his house and he needed to come to the Grayslake Police Department; she also informed him that his son was at the Grayslake Police Department. The Defendant told Kuhfuss that he would call her back. According to Kuhfuss, the Defendant did not ask about his wife, son, or the nature of the situation. Approximately half an hour later Kuhfuss called the Defendant again and informed him there was a problem at his house and that he was needed at the Grayslake Police Department. According to Kuhfuss, the Defendant again said he would call her back. She did not speak to the Defendant again. (R.2333-2337.)

Kuhfuss testified that shortly before the Defendant's trial in September of 1995 she was asked by the State's Attorney's Office to prepare a written summary of her conversations with the Defendant; she compiled the report, some five months after the conversations took place. Additionally, Kuhfuss testified that her conversations with the Defendant were recorded, but she does not know the whereabouts of the tape containing the conversations. Kuhfuss testified that the timing of the phone calls were her approximations. (R.2337-2346.)

The Defendant testified that on the morning of the attack on his wife, he received a call from his wife who told him that a black man had just been to the front door asking to use the phone. The Defendant told his wife to immediately call the police. (R.2621-2627.) Shortly thereafter, the Defendant received a call from the Grayslake Police Department informing him that something happened at his house and his son was at the police station. Curious as to why his son was at the police station without his wife, the Defendant requested information about Angela. The police refused to give further details and told him to come to the station. The Defendant left immediately for the Grayslake Police Department. He called the Grayslake Police Department en route only to again be denied further information. He arrived at the Grayslake Police Department around noon. (R.2599-2604.)

Upon his arrival, the police informed the Defendant that his wife was attacked in her home. The police then informed the Defendant that Solti and Jones were saying that he had hired them to kill his wife. The Defendant was in shock over the allegation. Despite repeated deceptive questioning by the police, the Defendant denied any involvement in the attack. The police held him until 3:00 or 4:00 p.m. before he was released The Defendant and his wife resided with Angela's parents until the time of his arrest approximately one month after the attack. (R.2604-2621.)

The Illinois Appellate Court, Second District, upheld the trial court's ruling denying the Defendant's Motion in Limine regarding the nature and content of the conversation between the Defendant and the Grayslake Police Department.

**Right to Confrontation vs.
Attorney Client Privilege**

The State filed a Motion in Limine requesting that the Defendant be prohibited from introducing evidence of a conversation between Attorney Robert Ritacca and Leroy Solti, a co-defendant and alleged co-conspirator, and a related letter. (C.351-354, 535-552, 561-562; R.1351-1375.)

At the hearing on the State's Motion in Limine, Robert Ritacca, a practicing attorney licensed for eighteen years, testified that Leroy Solti contacted him and requested that Ritacca visit him at the Lake County Jail where Solti was incarcerated. At that meeting on September 3, 1995, (R.2045-2046) shortly before the Defendant's first trial, Solti asked Ritacca to pass a letter to the co-defendant, Lamar Jones. After discussing the situation with Solti, Ritacca refused to pass the letter as requested by Solti because he felt that Solti desired his services simply as a messenger and that, based on the meeting, Solti was going to commit perjury at the Defendant's trial. Solti also wanted Ritacca to look into the circumstances surrounding his plea of guilty to charges related to the attack on the Defendant's wife. Ritacca never spoke to Solti regrading a fee for his representation. Subsequently, Ritacca informed the Defendant's attorney of his conversation with Solti prior to his first trial, and later informed Robert Will, the Defendant's appellate counsel and second trial attorney. (R.2008-2026, 2054-2055, 2069-2076.)

In the conversation at the jail, Solti told Ritacca that he took his car to be repaired at the Defendant's shop and that Solti and the Defendant had an argument over the cost of repairs. Solti claimed that the Defendant then

asked him to rob the Defendant's house to pay the repair bill. Solti then told Ritacca that he went to the house but never had the opportunity to commit the robbery because some other person was already at the house attacking the Defendant's wife. Solti claimed that he tried to save the child in the house during the attack before fleeing the area. Solti was then stopped by the police after leaving the neighborhood. Solti claimed to Ritacca that the police planted a ring in his pocket and gun in the car. Solti then asked Ritacca to deliver a letter to the co-defendant, Lamar Jones, which laid out the story Solti had told Ritacca. Solti told Ritacca that he knew where the Defendant lived because he followed him home one night. Solti felt that he was set up by the police. (R.2052-2053, 2076-2078.)

The court ruled that the conversation between Ritacca and Solti was privileged and inadmissible at trial. (R.2050, 2087-2100.)

REASONS FOR GRANTING THE WRIT

I.

Whether the Illinois Appellate Court Erred in Affirming the Trial Court's Denial of the Defendant's Motion to Dismiss and Motion in Limine Based upon the State's Discovery Violations thus Denying the Defendant his Sixth Amendment and Due Process Rights.

At trial, the State elicited damaging testimony from both June Kuhfuss and Susan Bobka regarding the Defendant's demeanor, lack of interest in the condition of his wife, son, and house, and the apparent lateness in his arrival at the Grayslake Police Department. The

tapes of the recorded conversations between the Defendant and the Grayslake Police Department, in the possession of the State and the Grayslake Police Department, were apparently lost or destroyed sometime after August 18, 1995, the date on which the State first revealed their existence. Because of the unavailability of those tapes, the Defendant was deprived of highly relevant evidence with which the testimony of Kuhfuss and Bobka could have been rebutted. The Defendant's ability to cross-examine Kuhfuss and Bobka was crippled due to the loss or destruction of the tapes of their conversations.

Further, where highly probative evidence is requested by the defense in a discovery motion, the State is on notice that the evidence must be preserved, and the defense is not required to make an independent showing that the evidence has exculpatory value in order to establish a due process violation. (*People v. Sleboda* (1988), 166 Ill.App.3d 42, 519 N.E.2d 512.) If the State proceeds to destroy the evidence, appropriate sanctions may be imposed even if the destruction is inadvertent. No showing of bad faith is necessary. *People v. Koutsakis* (1993), 255 Ill.App.3d 306, 627 N.E.2d 388; *People v. Newberry* (1995), 166 Ill.2d 310, 652 N.E.2d 288.

The tapes containing Defendant's conversations with the police which were lost or destroyed by the State violated the Defendant's right to a fair trial, right to confront the witnesses against him, and right to due process. It is obvious that testimony regarding the demeanor of a person accused of soliciting the murder of his wife shortly after the attempted murder is highly relevant to the determination of his guilt. Here, the tapes of the Defendant's conversations with the Grayslake Police

Department were pivotal in determining the accuracy of, and weight to be given to, the testimony of the State's witnesses. As an appropriate discovery sanction, at the very least, the testimony of the State's witnesses regarding conversations with the Defendant shortly after the attack on his wife should have been stricken or excluded. *People v. Petty* (2000), 311 Ill.App.3d 301, 244 Ill.Dec. 171, 724 N.E.2d 1059.

II.

Whether the Illinois Appellate Court Erred in Affirming The Trial Court's Granting the State's Motion in Limine Based upon the Attorney-client Privilege Superceding the Defendant's Sixth Amendment and Due Process Rights.

The State filed a Motion in Limine requesting that the Defendant be prohibited from introducing evidence of a conversation between Attorney Robert Ritacca and Leroy Solti, a co-defendant and alleged co-conspirator, and a related letter.

The Sixth Amendment to the United States Constitution states in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to *** be confronted with the witnesses against him." Article One, Section 8 of the Constitution of the State of Illinois states in pertinent part: "In criminal prosecutions, the accused shall have the right to be confronted with the witnesses against him ***."

Rule 1.6 of the Illinois Supreme Court Rules of Professional Conduct states in pertinent part:

"(a) Except when *** permitted under Rule 1.6(c), a lawyer shall not, during or after termination of the professional relationship with the client, use or reveal a confidence or secret of the client known to the lawyer unless the client consents after disclosure.

* * *

(c) A lawyer may use or reveal:

* * *

(2) the intention of a client to commit a crime in circumstances other than those enumerated in Rule 1.6(b) ***."

At the hearing on the State's Motion in Limine, Robert Ritacca, a practicing attorney licensed for eighteen years, testified that Leroy Solti contacted him and requested that Ritacca visit him at the Lake County Jail where Solti was incarcerated. At that meeting on September 3, 1995, shortly before the Defendant's first trial, Solti asked Ritacca to pass a letter to the co-defendant, Lamar Jones. After discussing the situation with Solti, Ritacca refused to pass the letter as requested by Solti because he felt that Solti desired his services simply as a messenger to the co-defendant, Lamar Jones, and that, based on the meeting, Solti was going to commit perjury at the Defendant's trial. Solti also wanted Ritacca to look into the circumstances surrounding his plea of guilty to charges related to the attack on the Defendant's wife. Ritacca never spoke to Solti regarding a fee for his representation. Subsequently, Ritacca informed the Defendant's attorney of his conversation with Solti prior to his first trial, and later informed Robert Will, the Defendant's appellate counsel and second trial attorney.

In his conversation with Ritacca, Solti told Ritacca that he took his car to be repaired at the Defendant's shop and that Solti and the Defendant had an argument over the cost of repairs. Solti claimed the Defendant then asked him to rob the Defendant's house to pay the repair bill. Solti then told Ritacca that he went to the house but never had the opportunity to rob the house because somebody was already at the house attacking the Defendant's wife. Solti claimed that he tried to save the child in the house during the attack before Solti fled the area. Solti was then stopped by the police after leaving the neighborhood. Solti claimed to Ritacca that the police planted a ring in his pocket and gun in the car. Solti then asked Ritacca to deliver a letter to the co-defendant, Lamar Jones, to communicate the story Solti had told Ritacca. Solti told Ritacca that he knew where the Defendant lived because he followed him home one night. Solti told Ritacca that he was set up by the police.

Solti told Ritacca that he already plead guilty to the charges against him stemming from the attack on the Defendant's wife. Solti told Ritacca that he wanted the co-defendant, Lamar Jones, to testify according to the letter Ritacca refused to pass along. Solti told Ritacca that he would do and say anything the State wanted him to say in order to minimize his sentence. Upon further questioning by Ritacca, Solti changed various details of his story. Solti changed the location of the attack from outside of the house to inside a bedroom. Solti also changed the point of entry into the house from the front door to the back door.

Ritacca ended the conversation with Solti by telling Solti that Ritacca felt he was a liar and that Ritacca would not be a party to perjury. Ritacca testified that he

felt ethically responsible to inform the Defendant's attorney of the planned perjury. Ritacca neither obtained a written waiver from Solti, nor did Ritacca inform Solti, prior to speaking to the Defendant's attorneys.

The court ruled that the conversation between Ritacca and Solti was privileged and inadmissible at trial. In determining that the conversation was inadmissible, the court asserted that the State was the party claiming that an attorney-client privilege applied to the conversation. In ruling on the motion barring Ritacca's testimony, the court found that the State has the initial burden of establishing attorney-client privilege. The court found that the Defendant then had the burden to show that an exception to the privilege applied. The court then ruled that the Defendant had not met the burden of showing that an exception applied to Solti's conversation with Ritacca and granted the State's Motion in Limine.

Initially, it should be noted that the attorney-client privilege requires the client to raise the privilege. (*In re Chicago Flood Litigation* (1997), 289 Ill.App.3d 937, 683 N.E.2d 421.) In the case at bar, the only party raising the alleged privilege was the State. Leroy Solti, the only one who could raise the privilege, denied that the conversation with Ritacca ever took place. Further, by testifying and denying that the conversation with Ritacca ever took place, Solti waived any privilege that may have attached to that conversation. Likewise, once Solti asked Ritacca to pass along the letter instructing co-defendant Jones on how he should testify, he waived any privilege that may have attached to the request.

Even if this court finds that the State could raise the privilege on behalf of Solti, and that Solti did not waive the privilege, a major exception to the attorney-client

privilege applies when a client seeks or obtains the services of an attorney in furtherance of criminal or fraudulent activity. (*People v. Wurbs* (1976), 38 Ill.App.3d 360, 364, 347 N.E.2d 879.) The rationale for this exception is that in seeking legal counsel to further a crime or fraud, the client does not seek advice from an attorney in his professional capacity. Thus, where the crime-fraud exception applies, no attorney-client privilege exists whatsoever, and the communication is not privileged. *In re Marriage of Decker* (1992), 153 Ill.2d 298, 606 N.E.2d 1094.

The attorney-client privilege does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime. (*United States v. Zolin* (1989), 491 U.S. 554, 109 S.Ct. 2619.) An attorney's duty of confidentiality does not extend to a client's announced plans to engage in future criminal conduct. *Nix v. Whiteside* (1986), 475 U.S. 157, 106 S.Ct. 988.

Undeniably, Ritacca's conversation with Solti, if admissible, would provide strong impeachment of a very key witness in the State's case against the Defendant. The court, in ruling that such evidence was inadmissible, crippled the ability of the Defendant to cross-examine and impeach Solti's testimony.

Further, even if this court finds that the privilege exists, the Defendant's right to confrontation is greater than Solti's privilege. The court based its finding of guilt primarily on finding the State's main witnesses credible. By granting the State's Motion in Limine, the court effectively denied the Defendant's right to confront Solti's testimony at trial. Under the circumstances, a right that is paramount to the privilege the State is attempting to exercise on behalf of Solti.

CONCLUSION

We respectfully pray, for the reasons stated above, that the petition should be granted.

Respectfully submitted,

ROBERT P. WILL, JR.
Counsel of Record
ROBERT P. WILL, JR. & ASSOCIATES
Seven South County Street
Waukegan, Illinois 60085
(847) 336-4440

Attorney for Petitioner

APPENDICES

APPENDIX A

PEOPLE of the State of Illinois,
Plaintiff-Appellee,
v.
Yechiel ABRAMOV,
Defendant-Appellant.
No. 2-99-0424
Appellate Court of Illinois,
Second District.
April 5, 2001.

RULE 23 ORDER

Following a bench trial in the circuit court of Lake County, defendant, Yechiel Abramov, was convicted on one count each of solicitation of murder for hire (720 ILCS 5/8—1.2 (West 1994)), attempted first degree murder, (720 ILCS 5/8—3 (West 1994)), and aggravated battery with a firearm (720 ILCS 5/12—4.2 (West 1994)). Defendant raises four issues on appeal. First, defendant contends he was not proven guilty beyond a reasonable doubt. Second, defendant argues venue was improper regarding one count of the indictment. Third, defendant asserts that the trial court erred in failing to remedy certain discovery violations committed by the State. Fourth, defendant argues that the trial court erred in barring the statement of a witness on the basis of the attorney-client privilege.

Before turning to the merits of this case, we admonish both parties regarding their failure to comply with the applicable Supreme Court Rules regarding citations. See 145 Ill. 2d R. 6; 177 Ill. 2d R. 341(d). Defendant's citations to cases only rarely provide a reference to the pages upon which the matter relied on appears. While

the State generally provides pinpoint citations, we disapprove of its practice of relying upon a computer database for case law and not providing a citation to the portion of the case relied upon when the database has not yet made page numbers available. Supreme Court Rule 6 requires citations to the official reporter. 145 Ill. 2d R. 6. For several cases, where the State asserts that their database did not yet contain the relevant page citations, the official version of the reporter containing the case had been published prior to the filing of their brief.

I. BACKGROUND

On April 12, 1995, Lamar Jones and Leroy Solti, broke into defendant's home, which was located at 212 Killarney Road in Grayslake. Defendant and his family had moved into this house approximately five weeks earlier. Defendant's wife, Angela, and his son were present. Defendant was at work. Jones and Solti stabbed and shot Angela. They were apprehended shortly thereafter, and told police that defendant had hired them to kill his wife, Angela. Solti testified that he first became acquainted with defendant when he brought his car in for repairs at the automotive shop where defendant worked. After receiving an estimate, Solti told defendant he did not have enough to pay for the repairs. Defendant told Solti not to worry because he had a job for him. Subsequently, defendant requested that he kill Angela.

Two other witnesses, Nathan Weaver and Eric Bell, testified that defendant had previously attempted to hire them to kill Angela. At the time, defendant and his family were living on Cicero Avenue in Chicago. Although neither Weaver nor Bell intended to kill her, they led

defendant to believe that they did because defendant was giving them money. At one point, Weaver and Bell staged a robbery, with defendant's cooperation, where they were to kill Angela and take money from defendant. They only did the latter. Extensive testimony was presented in the trial below, and it will not be recited at this point. Additional facts will be discussed as they pertain to the issues raised by the parties.

II. PROOF OF GUILT BEYOND A REASONABLE DOUBT

Defendant contends that the State failed to prove him guilty beyond a reasonable doubt because the four main witnesses upon which the State's case rested were thoroughly impeached, biased, and their testimony was rife with inconsistencies. In assessing such a challenge, all of the evidence must be viewed in the light most favorable to the prosecution. *People v. Manning,* 182 Ill. 2d 193, 210 (1998). The proper inquiry is whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *People v. Smith,* 185 Ill. 2d 532, 541 (1999). A conviction will be upheld unless the evidence is so unsatisfactory as to create a reasonable doubt about the defendant's guilt. *People v. Eyler,* 133 Ill. 2d 173, 191 (1989). This standard is applicable in bench trials. *People v. Feld,* 267 Ill. App. 3d 61 (1994). It is the role of the trier of fact to assess the credibility of witnesses, determine weight given the evidence, and draw reasonable inferences therefrom. *People v. Wiley,* 165 Ill. 2d 259, 297 (1995). We will not substitute our judgment for that of the fact finder on questions involving credibility of witnesses or weight of evidence. *People v. Young,* 128 Ill. 2d 1, 51 (1989).

Defendant asserts that the testimony of Jones, Solti, Weaver, and Bell is not worthy of belief. Defendant first notes that each was a convicted felon and admitted gangmember. Furthermore, Solti and Jones testified as part of a plea agreement, while Weaver and Bell were never prosecuted for the staged robbery of defendant and his wife. The trial court was, however, presented with this potentially impeaching information, and it was the trial court's role to weigh this evidence and determine defendant's guilt or innocence. *People v. Brisbon,* 106 Ill. 2d 342, 361 (1985). We will not substitute our judgment for that of the trial court, which had the opportunity to observe these witnesses' testimony first hand. See *People v. Calusinski,* 314 Ill. App. 3d 955, 961 (2000).

Defendant next points to a number of inconsistencies in the testimony of the State's witnesses. Bell testified that defendant gave him a matchbook with the address to his Grayslake home on it. Jacqueline Campbell, Bell's girlfriend testified that she threw the matchbook away; however, her testimony also indicated that she saw the matchbook approximately 5 months before defendant moved to Grayslake. It is conceivable that Campbell was mistaken as to the date. Weaver testified that after defendant moved, he showed Weaver where he lived in Grayslake. Thus, defendant could have given Weaver the matchbook at a later time. In any event, it was for the trier of fact to resolve conflicts in the evidence. *People v. Kelchner,* 221 Ill. App. 3d 25, 30 (1991). Furthermore, Campbell also testified that defendant came to her apartment looking for Bell. She did not identify defendant during the trial because of her poor eyesight and the distance defendant was sitting from the witness stand, however, Campbell did identify defendant in an earlier photographic lineup.

Weaver claimed he was introduced to defendant by Jeffrey Steele, a co-worker of defendant. Steele denied making this introduction. Defendant asserts that Weaver had no reason to lie about this. For the purposes of review, we reemphasize that we must view the record in the light most favorable to the prosecution. *Manning*, 182 Ill. 2d at 210. Steele was a co-worker of defendant, and it is possible that he was lying to protect defendant. Furthermore, it is possible that Steele was concerned about implicating himself in the criminal activity that followed the introduction. We cannot say that Steele's testimony was so credible that the trial court was required to accept it.

Defendant next argues that Jones testified that he attempted to procure .32 caliber bullets during the afternoon of April 11, 1995, for a gun that defendant did not give to Solti until the evening of that day. However, at one point, Jones testified that he did not remember the time that he tried to procure these bullets. Later, the following exchange took place between Jones and defense counsel:

> "Q I'm going to ask you when it was that you asked for the bullets from Nate Weaver?
>
> A I don't remember the exact date it was.
>
> Q What time of day was it?
>
> A Noon.
>
> Q At noon?
>
> A Nighttime."

Thereafter, defense counsel asked whether Jones had previously testified that he had attempted to procure the bullets in the afternoon, and Jones stated that he had.

Jones' testimony is an equivocal indication of a contradiction at best. From the record, it appears Jones did not recall when he tried to get the bullets. Again, it was the role of the trial court to resolve such conflicts in evidence. *Kelchner,* 221 Ill. App. 3d at 30. We cannot say that this possible inconsistency so undermined Solti's and Jones' testimony that the trial court was not entitled to accept it.

Defendant points to other inconsistencies. For example, Bell told the police that defendant drove a blue car during their meetings, while stating at trial that the car was red. He also testified that he only saw Angela on one occasion, but told the police that defendant had pointed her out a few times. Bell stated to the police that the killing was to take place in an apartment on Touhy Avenue, but defendant lived on Cicero Avenue at the time. However, at trial he emphasized that the apartment was on Cicero. He testified that defendant had not told him what Angela looked like, but he told police investigators that defendant described her as having short blond hair. Angela's hair has never been blond. Jones testified that he was unaware of defendant approaching anyone else to kill Angela; however, before the Grand Jury, he testified that he was aware that defendant had approached Weaver and Bell. Defendant goes on to point out several other inconsistencies in the testimony and statements of Bell and Jones.

These inconsistencies undoubtedly exist; however, defendant's argument ignores other evidence which corroborates the testimony of these four witnesses. Weaver, Bell, Solti, and Jones were aware of the various details of defendant's life which would have been difficult, if not impossible, for them to learn from any source other than defendant. First, Weaver testified that defendant told

him Angela always wore a pair of diamond earrings. Angela confirmed this fact during her testimony. Second, both Weaver and Bell testified that defendant instructed them to follow Angela and her mother to a mall and kill her there. Defendant told them that his mother-in-law drove a gray car. Angela's mother testified that she drove a gray car at that time. Both testified that they would regularly go to a mall together when Angela's mother came over on one of her regular afternoon visits. Third, Campbell described defendant's work uniform and picked him out of a photographic lineup, despite defendant's assertion that he never met her. Fourth, Bell knew defendant's apartment on Cicero was on the third floor. Fifth, both Weaver and Bell accurately describe defendant's work uniform. Sixth, Weaver and Bell both knew that Angela normally awoke at about 10 a.m. Seventh, Bell testified that defendant instructed them that they should not attempt to kill Angela on a Saturday, but any other day was fine. Saturday was the only day defendant did not work. Eighth, Weaver and Bell testified that prior to the staged robbery where they were to kill Angela, defendant showed them that he was carrying a large sum of money. During the staged robbery, after defendant produced some money, Weaver demanded more, indicating he knew defendant was carrying more money than he initially produced. Furthermore, Angela testified that it was not customary for defendant to carry a lot of money, however, on that occasion, he took a lot of money from the apartment with him. Ninth, Bell and Weaver both knew defendant's new home in Grayslake was near the railroad tracks. Bell's testimony that this house was the second one on the left from a stop sign was confirmed by Angela. Tenth, Bell was able to accurately describe the location of both telephones in this house. Eleventh, Jones and Solti testified

that defendant told them that an older man might be present when they went to kill Angela. Angela's father regularly visited her. That they knew this despite the fact that he was not present at the time they made the attempt indicates that defendant must have told them of the father's possible presence. Twelfth, Solti testified that defendant showed him a little over $1,000 in cash the night before the attack. Defendant testified that he closed a bank account and withdrew about $1,200 in cash the night before the attack and paid the money to an attorney the evening of the day of the attack. Defendant offers no plausible explanation of how these witnesses could have learned these facts from a source other than defendant.

Furthermore, Solti, Jones, Weaver, and Bell all testified consistently that defendant instructed them to not hurt his son. Solti and Jones testified they were to put the child in another room, and Solti added they were to lock the door to the room. Angela testified that one of her attackers immediately took the child to another room and that after the attack, she had to break down the door to the room where the child was because it was locked.

In finding defendant guilty, the trial court, in addition to the knowledge Solti and Jones possessed which could only have come from defendant, relied on the nature of the events which took place during the attack on Angela. The trial court noted that the attack appeared to be an execution rather than a robbery. This finding comports with the evidence presented in this case. At the time Solti and Jones entered the house, they were aware that Angela was home because Solti had previously knocked on the door and been denied access. They drove all the way from Evanston to Grayslake to get to the defen-

dant's house, which was located in a subdivision that was transversed by curving roads. That they made this trip indicates that they were not interested in burglarizing any house, rather, they were targeting the house where Angela resided. Defendant's house was sparsely furnished, so upon looking in through the patio door before breaking in, Solti and Jones would not have seen much to steal. Finally, Solti and Jones left two items of jewelry lying on the floor where the attack occurred.

Substantial evidence existed that supported the trial court's judgment regarding defendant's guilt. Conflicts in the evidence did exist, and the State's primary witnesses were felons and gangmembers. However, it was the trial court's function to resolve these conflicts and assess the credibility of these witnesses. *Wiley,* 165 Ill. 2d at 297. Given the substantial evidence indicating guilt, we cannot conclude that the defendant was not proven guilty beyond a reasonable doubt.

In a related argument, defendant contends that the trial court improperly shifted the burden of proof to defendant to prove his innocence. Defendant relies on the following statement made by the trial court in the course of pronouncing defendant guilty: "(t)he question essentially is, was there a plan, as the defendant has argued, to make Mr. Abramov a victim." Defendant argues that the trial court based its finding of guilt on defendant's failure to prove his theory of the case. It is, of course, axiomatic that the State bears the burden of proving a criminal defendant guilty. *People v. Zarate,* 264 Ill. App. 3d 667, 673 (1994).

The State's only response to this argument is that it is waived because the defendant has failed to provide a citation to the record for the trial court's statement re-

lied on by defendant in violation of Supreme Court Rule 341(e)(7). 177 Ill. 2d R. 341(e)(7). Rule 341 is not, however, a limitation upon this court's jurisdiction; it is an admonishment to the parties. *Taake v. WHGK, Inc.*, 228 Ill. App. 3d 692, 714 (1992). While a party may be bound by such a waiver, this court, having the responsibility of reaching a just decision, is not. *Majcher v. Laurel Motors, Inc.*, 287 Ill. App. 3d 719, 731 (1997). Where a brief is sufficient to allow review on the merits, we may elect to do so. *Taake*, 228 Ill. App. 3d at 714. The court's statement, relied on by defendant in support of his current argument and quoted in the preceding paragraph, appeared in the trial court's relatively short finding of guilt. Our review of this issue was not substantially impaired by this minor omission of a citation to the record. Accordingly, we will proceed to the merits of this argument.

Reading the trial court's opinion as a whole, it is clear that the burden was not shifted to defendant to prove his innocence. The trial court specifically noted that Jones' and Solti's actions during the attack were consistent with an execution. The court also expressly relied on Solti's knowledge of various facts which he could only have learned from defendant. The trial court explicitly stated "Why did Jones and Solti try to kill the (defendant's) wife? I find that it was because Mr. Abramov asked them to do it." This statement is an affirmative finding that the State met its burden of proof, rather than a statement that defendant failed to prove his theory of the case.

Presumably, by presenting an alternative theory of the case, defendant wanted the court to consider it. It was not improper for the court to do so. *Cf. People v. Makiel*, 263 Ill. App. 3d 54, 74 (1994) (holding the State, by at-

tempting to discredit defendant's theory of the case, did not impermissibly shift the burden of proof to the defendant.) Moreover, defendant's reliance on one statement made in the course of a decision where the trial court considered the totality of the evidence is unpersuasive. See *People v. Johnson*, 260 Ill. App. 3d 558, 565 (1994).

III. VENUE

Defendant next argues that the State failed to prove venue regarding one count of the indictment. This count, count 7, alleged defendant solicited Weaver to kill Angela. See 720 ILCS 5/8—1.2 (West 1994). The Criminal Code of 1961 (Code) states that "a person commits solicitation of murder for hire when, with the intent that the offense of first degree murder be committed, he procures another to commit that offense pursuant to any contract, agreement, understanding, command or request for money or anything of value." 720 ILCS—1.2 (West 1994).

Venue is a material allegation which the State bears the burden of proving beyond a reasonable doubt. *People v. Hagan,* 145 Ill. 2d 287, 300 (1991).[1] In order to satisfy this burden, the State must prove the county where the crime is alleged to have been committed is the county where the crime did occur. *People v. Adams*, 161 Ill. App. 3d 333, 341 (1994). Venue is proper in each county where

---

[1] At the time of the offenses at issue in the present case, the venue statute had not yet been amended to eliminate the State's burden to prove venue. This amendment does not apply retroactively. See *People v. Digirolamo,* 179 Ill. 2d 24, 50 (1997).

an element of an offense is committed. *People v. Eggerman,* 292 Ill. App. 3d 664, 650 (1997). Furthermore, section 1—6 of the Code provides that "(a) person who commits an inchoate offense may be tried in any county in which any act which is an element of the offense *** is committed." 720 ILCS 5/1—6(m) (West 1994).

In the present case, Weaver testified that defendant drove him to Grayslake in order to show him the house where Angela was now living. In the course of this testimony, Weaver described details about the house's location, such as that it was located near railroad tracks. Based on this testimony, the trial court could conclude that defendant did, in fact, bring Weaver to the Grayslake house. The purpose of this trip was to provide Weaver with the location of the house—knowledge he would need if he were going to kill Angela. It is immaterial that Weaver did not actually intend to kill her, as solicitation of murder for hire does not require an actual agreement between the parties. *People v. Breton,* 237 Ill. App. 3d 355, 362 (1992). It is sufficient to establish venue.

IV. DISCOVERY VIOLATIONS

Next, defendant argues that the trial court abused its discretion by failing to sanction the State for failing to preserve tapes upon which defendant's initial series of calls to the Grayslake police department were recorded. These tapes involved conversations between defendant, June Kuhfuss and Susan Bobka, two employees of the Grayslake Police Department. Both employees testified at trial regarding defendant's demeanor. Bobka added that defendant asked if his wife was dead despite the fact that she only told defendant to come to the station

because there was a problem at his house. She also stated that defendant did not ask about his son. Both testified to defendant's apparent slow response in coming to the police station following these calls. Defendant contends that the loss of the tapes memorializing these conversations severely hampered his ability to cross examine these witnesses.

In a pretrial hearing, Detective Douglass Hess, of the Grayslake Police Department, testified that a search for these missing tapes began approximately two weeks after the arrest of Jones and Solti. These arrests occurred on April 12, 1995. Bobka also testified that she assisted Hess in a search for the lost tapes. The earliest indication of any discovery order being entered in this case appears in the record of proceedings of defendant's arraignment on June 16, 1995, where the trial court stated "(t)he usual and customary orders of discovery will be entered." Thus, at the time the tapes were lost or destroyed, no discovery order or discovery motion by defendant existed.

Generally, the State is under no duty to preserve all material that is of conceivable evidentiary value to a particular prosecution. *People v. Newberry,* 166 Ill. 2d 310, 315 (1995) (quoting *Arizona v. Youngblood,* 488 U.S. 51, 58, 102 L. Ed. 2d 281, 389, 109 S. Ct. 333, 337 (1988)). However, where evidence possesses a readily apparent exculpatory value, it must be preserved. *People v. Sleboda,* 166 Ill. App. 3d 42, 53 (1988). Additionally, if the State destroys potentially useful evidence in bad faith, a due process violation occurs. *Newberry,* 166 Ill. 2d at 315. Neither the bad faith of the State nor the exculpatory value of the evidence need be shown where evidence is lost or destroyed after defendant has re-

quested its production. *People v. Koutsakis,* 255 Ill. App. 3d 306, 311-12 (1994).

Because the tapes were lost or destroyed prior to any request for their production, defendant was required to show either that they possessed exculpatory value or that the State destroyed them in bad faith. Defendant failed to make either showing. Regarding the exculpatory value of the tapes, defendant points us to no evidence which would indicate that Kuhfuss's and Bobka's testimony regarding the recorded conversations was inaccurate. As defendant recognizes, the testimony of these two witnesses was damaging. Thus, the only evidence before this court is that the tapes would have recorded a conversation that was damaging to defendant. Defendant's contention that the tapes contained material which could have rebutted Kuhfuss's and Bobka's testimony is pure speculation. Similarly, defendant points to nothing which indicates the State acted in bad faith in losing the tapes. It is unclear how the tapes were lost or destroyed. What is clear is that, once their loss was discovered, the State conducted an extensive search to try to find them.

Because defendant failed to show either that the State acted in bad faith or that the tapes were exculpatory, no discovery violation occurred. As such, the trial court did not abuse its discretion in denying defendant's motions or sanctions based on the loss of the tapes.

V. ATTORNEY/CLIENT PRIVILEGE

Defendant finally argues that the trial court erred in granting the State's motion in limine to exclude testimony from an attorney that Solti contacted prior to the

first trial. On September 3, 1995, Robert Ritacca, an attorney, went to the Lake County jail at Solti's request. Solti wanted Ritacca to look into the circumstances surrounding his guilty plea regarding the attack on Angela and see if a better plea could be negotiated. Solti related to Ritacca a version of events regarding the attack that substantially differed from that to which he testified at trial. Ritacca testified that, during this visit, Solti asked him to deliver a letter to Lamar Jones. Ritacca declined to do so, and the visit terminated without Ritacca being retained by Solti. Ritacca subsequently communicated these events to defendant's first attorney, as well as his current attorney.

The State filed a motion in limine seeking to bar defendant from cross examining Solti regarding his conversation with Ritacca because it was protected by attorney-client privilege. Finding the State fulfilled its burden of showing the privilege had attached, the trial court granted the motion. In the course of making this ruling, the trial court found that defendant had not established that the crime-fraud exception vitiated the privilege. Defendant now raises seven arguments attacking the trial court's ruling. At this point, defendant's brief breaks down into a series of conclusory arguments of a sentence or two in length, followed by strings of citations, most of which do not identify the portion of the cases upon which defendant is relying. Contentions must be supported by argument (See *People v. Hood*, 210 Ill. App. 3d 743, 746 (1991) (minimal argument regarding point raised would justify waiver), and arguments must be supported by citations to the pages upon which a party relies (145 Ill. 2d R. 6; 177 Ill. 2d R. 341 (d)). Accordingly, these arguments are waived. Furthermore, even if we were not to consider them waived, defendant's arguments would fail on the merits.

Defendant first contends that the State was not entitled to raise the privilege. According to defendant, the privilege was a personal right of Solti, which could not be vicariously exercised by a third party for that party's benefit. *People v. Ryan,* 30 Ill. 2d 456, 461 (1964). While we accept this principle of law, it is also fundamental that a party may not call a witness merely to cause the witness to invoke a privilege. See *People v. Everett,* 228 Ill. App. 3d 1054, 1060 (1992). In the present case, the State's representation that Solti had indicated he would not waive the privilege was uncontested. In such circumstances, a trial court may bar a witness from testifying. *People v. Cvetich,* 73 Ill. App. 3d 580, 584-85 (1979).

Defendant also contends that the crime-fraud exception (see *In re Marriage of Granger,* 197 Ill. App. 3d 363, 375 (1990)) applies in this case and renders the conversation between Solti and Ritacca unprivileged. According to defendant, Solti was seeking Ritacca's services in order to seek a better plea agreement by perjuring himself. The party asserting this exception bears the burden of proving its applicability. *In re Marriage of Decker,* 152 Ill. 2d 298, 321 (1992). The trial court concluded that defendant had not met this burden. Prior to ruling the exception did not apply, the court heard testimony from Ritacca, which it described as "all over the page." For example, Ritacca testified that he was unsure as to whether Solti had given a statement to the police, how Solti's testimony would differ, whether Solti was represented at the time, and how large Solti's police report was. Given the quality of Ritacca's testimony, we agree with the trial court that defendant failed to carry its burden with respect to this exception.

Additionally, defendant argues that the attorney-client privilege must give way to his superior right to confront

his accusers. See U.S. Const. Amend. VI. However, the right to confront one's accusers does not take precedence over the attorney client privilege. *People v. Knight,* 139 Ill. App. 3d 188, 194-95 (1985); *People v. Jacobson,* 119 Ill. App. 3d 103, 105 (1983). Like the right to confrontation, the attorney-client privilege is designed "to promote the judicial process itself." *Knight,* 139 Ill. App. 3d at 195. Thus, unlike some privileges deemed to be of secondary importance (see *Davis v. Alaska,* 415 U.S. 308, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974) (holding right to confrontation superior to statutory provision making juvenile witnesses' records confidential), the attorney-client privilege does not give way to a defendant's right under the confrontation clause. *Knight,* 139 Ill. App. 3d at 195.

Defendant's contention that Solti waived the privilege by testifying that he had no opportunity to talk to Jones is unpersuasive. According to defendant, he should have been allowed to use Solti's meeting with Ritacca to impeach him on this point. However, Ritacca testified that he declined to deliver any message to Jones. In order to be admitted for impeachment purposes, evidence must contradict what a witness testifies to in court. *Goldenberg v. Bazell,* 219 Ill. App. 3d 672, 679 (1991). Since Ritacca declined to convey anything to Jones, nothing occurred in their meeting with which Solti could have been impeached.

Defendant further asserts that the State waived the protection of the motion in limine by failing to object to defendant's question as to whether Solti had asked anyone to communicate with Jones on his behalf. Solti replied "no." Assuming *arguendo* that Solti's response and the State's failure to object constituted a waiver of the privilege, a proposition for which defendant provides no

authority, defendant should have sought to introduce the previously barred testimony of Ritacca at that time. Motions *in limine* are interlocutory in nature and are subject to reconsideration throughout the course of a trial. *Cunningham v. Millers General Insurance Co.*, 227 Ill. App. 3d 201, 205 (1992). Defendant's failure to call this purported waiver to the court's attention during the trial waives the issue. *Cf. People v. Pertz*, 242 Ill. App. 3d 864, 903 (1993) (holding trial court's grant of a second motion *in limine* by the State, after denying an earlier similar motion, proper where new matters arose bearing on the motion's propriety).

Also, according to defendant, Solti's request that Ritacca deliver a letter to his codefendant demonstrated "Solti's intent to disclose to a third person the same subject matter he discussed with Ritacca." See *In re Himmel*, 125 Ill. 2d 531, 542 (1988) (holding that "matters intended by a client for disclosure by the client's attorney to third parties, who are not agents of either the client or attorney, are not privileged"). Defendant relies on *People v. Werhollick*, 45 Ill. 2d 459, 462 (1970), where our supreme court found that an offer or acceptance made through defendant's attorney to become a witness for the State was not a privileged communication. We do not quarrel with this proposition of law. However, unlike *Werhollick*, where the content of the communication at issue was known, defendant has failed to establish the content of the letter Solti asked Ritacca to deliver. Ritacca testified he did not read it. Furthermore, Jones testified he had no idea from where the letter came. Solti denied ever having seen it. Accordingly, defendant has not established what, if anything, Solti intended to communicate to a third person during his conversation with Ritacca.

Finally, defendant contends that Solti's request to Ritacca to deliver a letter to his codefendant was not a privileged communication. It is unclear as to what use defendant would have put this evidence. Since Ritacca declined to deliver the letter, Solti's request would support no inference of collaboration. That the request was made did contradict Solti's statement that he never asked anyone to communicate with Jones; however, it would in no way contradict Solti's testimony regarding defendant's involvement in the attack on Angela and it is difficult to see how it would have affected the outcome of the trial. See *People v. Hanson,* 44 Ill. App. 3d 977, 983-84 (1977) (finding error harmless where prior inconsistent statement only whether a second police officer was present while an officer performed a field test on contraband).

Accordingly, even if we were to conclude that this issue had not been waived, we would find no error in the trial court's grant(ing) of this motion *in limine.*

VI. CONCLUSION

For the foregoing reasons, the decision of the circuit court of Lake County is affirmed.

Affirmed.

GROMETER, J., with RAPP and CALLUM, JJ., concurring.

APPENDIX B

STATE OF ILLINOIS APPELLATE COURT
SECOND DISTRICT

Office of the Clerk
847/695-3750
847/695-0092 TDD

Appellate Court Building
Elgin, Illinois
60120-5558

Appeal from the Circuit Court of County of Lake

Trial Court No. 95CF1214

THE COURT HAS THIS DAY, 5/04/01, ENTERED THE FOLLOWING ORDER IN THE CASE OF:

General No.: 2-99-0424
People v. Abramov, Yechiel

Upon consideration of the Court, the Petition for Rehearing by Defendant-Appellant, Yechiel Abramov, is hereby denied.
(Grometer, Rapp, & Callum, JJ.)

LOREN J. STROTZ,
Clerk

Cc: Robert P. Will, Jr. & Associates
Robert P. Will, Jr.
Honorable Michael J. Waller
Martin P. Moltz, Deputy Director
Joan M. Kripke

APPENDIX C

91707 SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

October 3, 2001

Mr. Robert P. Will, Jr.
Robert P. Will, Jr. & Associates
Seven South County Street
Waukegan, IL 60085

No. 91707 – People State of Illinois, respondent, v. Yechiel Abramov, petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 25, 2001.